

OIL 83-2223

16 September 1983

MEMORANDUM FOR: C/L&PD/OGC
DC/L&PD/OGC

FROM:

Office of Legislative Liaison

SUBJECT: S. 272 - Commerce Business Daily

1. This memorandum sets out and expands the discussion [redacted] DC/L&PD/OGC, and I had on 30 August 1983, concerning the applicability of S. 272 to the Agency. As you know, S. 272 was signed into law by the President on 11 August 1983 as Public Law 98-72 (copy attached), and requires special approvals for sole source procurements over specified threshold dollar amounts. As set out below, I have analyzed the argument that this special approval requirement does not apply to Agency procurement activities. [redacted]

2. Briefly stated, CIA could argue that its procurement actions, which are exempt from the publication requirements of this act, ~~should likewise be exempt from the special sole source approval requirement because the exemption from publication eliminates one of the elements required to obtain the special sole source approval, i.e., the responses to the published notice of procurement.~~ The strength of this argument is that it is based on a construction of the statute as a whole in light of its stated legislative purpose. The weakness of this position is that the exception must be implied into statutory language that explicitly provides for exceptions in other situations. [redacted]

3. The purpose of this statute is "[t]o improve small business access to Federal procurement information." Each section of this act implements that legislative purpose. Subsection (e)(1) of this bill provides that notice of all competitive and noncompetitive civilian and defense procurement actions over \$10,000 must be published in the Commerce Business Daily. This subsection also contains an exemption from this publication requirement for certain procurement situations, including procurements where it is determined on a case-by-case basis that "the procurement for security reasons is of a

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classified nature." It is my understanding that your office believes that virtually all procurement actions of the CIA are of a "classified nature" even if the actual contract is not classified. As to procurements under the National Reconnaissance Program, such contracts would be both of a classified nature and actually classified. Consequently, this exception (which is a restatement of prior law in this area and reflects Small Business Association (SBA) acquiescence in CIA's not publishing procurement notices) permits CIA to continue its current practice of not publishing notice of proposed contract actions. [redacted]

4. Subsections (e)(2) and (e)(3) contain substantive and procedural requirements concerning the (e)(1) notice requirement and consequently do not apply to CIA's procurement activities, which are exempt as classified in nature. Both (e)(2) and (e)(3) begin with similarly worded qualifications that these subsections apply only when notice is required to be published pursuant to (e)(1). [redacted]

5. Subsection (e)(4) provides that a federal agency "may not commence negotiations for the award of a sole source contract . . . for more than \$1,000,000 in fiscal year 1984" (\$500,000 in fiscal year 1985 and \$300,000 in fiscal year 1986) unless (1) the head of the procuring activity or his deputy, on a non-delegable basis, has approved the authority to enter into such contract; and (2) the contracting officer has evaluated the responses to the notice required by (e)(1). This dual requirement -- that the head of the procuring authority approve and that the contracting officer evaluate the responses to the published notice -- indicates that this provision was not intended to apply when the procurement activity is exempt from the publication requirement of (e)(1). Consequently, the fact that CIA's procurements are exempt from the publication requirement argues that they are exempt from (e)(4) as well. [redacted]

6. Further, it can be argued that this statutory scheme anticipates that the responses to the published notice should be taken into account in the judgment by the head of the procuring authority whether or not to approve the sole source contract. Since notice of CIA's procurement activities are not published pursuant to (e)(1), there will be no responses to consider. Without such responses to a published notice of procurement, there is little objective, external information upon which the head of the procuring activity could base a sole source approval. Requiring approval without this information is mere formality and would do little to advance the legislative purpose of this statute -- to enhance small business access to Government contracts information. [redacted]

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7. The weaknesses in this argument turns on the fact that, unlike (e)(2) and (e)(3), subsection (e)(4) does not begin with a reference that it applies only when notice is required by (e)(1). Rather, (e)(4) states that it applies "[n]otwithstanding any other provision of law." Further, (e)(4) explicitly excludes procurements "of such unusual and compelling urgency that the Government would be seriously injured if the provisions of [(e)(4)] were complied with...." This language is essentially the same as the second exemption to the (e)(1) publication requirement. Arguably, the explicit inclusion of one (e)(1) exemption and the failure to include the CIA's (e)(1) exemption indicates that the (e)(4) sole source approval requirement applies to the CIA despite the fact that CIA's procurements need not be published pursuant to (e)(1). However, this language in (e)(4) exempting procurements of "unusual and compelling urgency" was a last minute addition to S. 272 after the Conference Committee reported it out. Predictably, the Conference Report does not address the significance of this language and, indeed, does not clarify the larger issue whether (e)(1) publication exemptions limit the reach of the (e)(4) approval requirement. Considering the manner in which this "urgency" exemption language was added to S. 272, it is questionable whether it can support the inference that all other (e)(1) publication exemptions may not be implied into the (e)(4) approval process. [REDACTED]

8. As an aside, (e)(4) also contains a requirement that Federal agencies report annually to Congress concerning each sole source negotiation above the threshold amount in which the head of the procuring activity or his deputy did not approve the authority to enter into the contract. It is my understanding that CIA traditionally has not reported such contract-related information to the SBA since to do so would be inconsistent with the Agency's statutory responsibility to protect sources and methods. [REDACTED]

9. In conclusion, there are both strengths and weaknesses to the argument that the sole source approval requirement in (e)(4) is limited by the exemptions to the publication requirement in (e)(1). Although a close question, I believe that the (e)(4) approval requirement was meant to apply only to procurements for which notice was published in the Commerce Business Daily. Absent publication of notice, the high-level non-delegable approval required by (e)(4) serves no purpose that would enhance small business access to Federal procurement information. [REDACTED]

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(16 Sept 83)

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PUBLIC LAW 98-72—AUG. 11, 1983

97 STAT. 403

Public Law 98-72
98th Congress

An Act

To improve small business access to Federal procurement information.

Aug. 11, 1983

[S. 272]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 8(e) of the Small Business Act is amended to read as follows:

Small Business
Act,
amendment.
15 USC 637.

"(e)(1) It shall be the duty of the Secretary of Commerce, and the Secretary is hereby empowered, to obtain notice of all proposed competitive and noncompetitive civilian and defense procurement actions of \$10,000 and above from any Federal department, establishment or agency (hereinafter in this subsection referred to as 'department') engaged in procurement of property, supplies, and services in the United States; and to publicize such notices in the daily publication Commerce Business Daily, immediately after the necessity for the procurement is established: *Provided*, That nothing in this paragraph shall require publication of such notices with respect to those procurements in which it is determined on a case-by-case basis that (A) the procurement for security reasons is of a classified nature; (B) the Federal department's need for the property, supplies, or services is of such unusual and compelling urgency that the Government would be seriously injured if the time periods provided for in paragraph (2) were complied with; (C) a foreign government reimburses the Federal department for the cost of the procurement of the property, supplies, or services for such government and only one source is available, or the terms of an international agreement or treaty between the United States and a foreign government authorize or require that all such procurement shall be from sources specified within such international agreement or treaty; (D) the procurement is made from another Government department or agency, or a mandatory source of supply; (E) the procurement is for utility services and only one source is available; (F) the procurement is made against an order placed under a requirement or similar contract, including orders for perishable subsistence supplies; (G) the procurement results from acceptance of a proposal pursuant to the Small Business Innovation Development Act of 1982 or an unsolicited proposal that demonstrates a unique or innovative research concept and publication of such unsolicited proposal would improperly disclose the originality of thought or innovativeness of the proposed research; or (H) it is determined in writing by the head of the Federal department, with the concurrence of the Administrator, that advance notice is not appropriate or reasonable.

Proposed
procurement
action notices,
publication.

15 USC 631 note.

"(2) Whenever a Federal department is required to publish notice of procurement actions pursuant to paragraph (1) of this subsection, such department shall not—

Procurement
actions by
Federal
departments,
notice
requirements.

"(A) issue a solicitation until at least fifteen days have elapsed from the date of publication of a proper notice of the action in the Commerce Business Daily, except if the solicitation is for procurement of requirements categorized as research or

97 STAT. 404

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development effort, in which case until at least thirty days have elapsed from the date of such publication;

"(B) foreclosure competition until at least thirty days have elapsed from either (i) the date of issuance of the solicitation, or (ii) in the case of orders under a basic agreement, basic ordering agreement, or similar arrangement, the date of publication of a proper notice of intent to place the order; or

"(C) commence negotiations for the award of a sole source contract until at least thirty days have elapsed from the date of publication of a proper notice of intent to contract: *Provided*, That nothing in this subparagraph shall prohibit an officer or employee of a Federal department from responding to a request for information.

Notice format.

"(3) Whenever notice is required by paragraph (1), such notice shall include—

"(A) a clear description of the property, supplies, or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(B) the name, address and telephone number of the officer or employee of the Federal department who may be contacted for the purpose of obtaining a copy of either the solicitation or, if the notice is for an intent to contract on a sole source basis, such specification and information as practicable regarding the service or performance to be awarded; and

"(C) solely with respect to notice of intent to contract on a sole source basis, a statement that interested persons are invited to identify their interest and capability to respond to such requirement, or to submit proposals in response to such notice, within the stated period of time provided under paragraph (2).

15 USC 638.

"(4) Notwithstanding any other provision of law, unless the negotiations would be conducted pursuant to this section or section 9 of this Act or unless a Federal department's need for the property, supplies, or services is of such unusual and compelling urgency that the Government would be seriously injured if the provisions of this paragraph were complied with, a Federal department may not commence negotiations for the award of a sole source contract or a contract that results from an unsolicited proposal for more than \$1,000,000 in fiscal year 1984, for more than \$500,000 in fiscal year 1985 and for more than \$300,000 in fiscal year 1986 and each year thereafter unless—

"(A) the head of the procuring activity or his deputy, on a nondelegable basis, has approved the authority to enter into such contract, and

"(B) the contracting officer for such contract has evaluated the responses to the notice of procurement action required in subparagraph (3)(C):

Provided, That nothing in this subparagraph shall prohibit an officer or employee of a Federal department from responding to a request for information. Annually, each department shall report to the Congress on each negotiation above the stated amount if the head of the procuring activity or his deputy did not approve the authority to enter into such contract.

Report to Congress.

"(5) In the case of all procurement actions in excess of \$25,000 in which the award of a contract is likely to result in the award of subcontracts under such contract, unless the procurement for security reasons is of a classified nature, the Federal department shall

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97 STAT. 405

promptly furnish for publication by the Secretary of Commerce a notice announcing the award in the Commerce Business Daily.

“(6) As used in this subsection—

“(A) the term ‘sole source contract’ means a contract for the purchase of property, supplies or services which is entered into or proposed to be entered into by a Federal department after soliciting and negotiating with only one source.

“Sole source contract.”

“(B) the term ‘unsolicited proposal’ means a proposal that is submitted to a Federal department on the initiative of the submitter for the purpose of obtaining a contract with the United States Government, and which is not in response to a formal or informal request (other than a departmental request constituting a publicized general statement of need in areas of science and technology-based research and development that are of interest to the department).”

“Unsolicited proposal.”

(b)(1) Except as to the amendments made to section 8(e)(4) of the Small Business Act as added by section (a) of this Act, the amendments made by this Act shall apply to procurement actions initiated ninety days after the date of enactment of this Act.

15 USC 637 note.

(2) The amendments made to section 8(e)(4) of the Small Business Act as added by section (a) of this Act shall apply to procurement actions initiated on or after October 1, 1983.

(3) The provisions of this Act shall apply to the Tennessee Valley Authority only with respect to procurements to be paid from appropriated funds.

Approved August 11, 1983.

LEGISLATIVE HISTORY—S. 272 (H.R. 1043):

HOUSE REPORT No. 98-262 (Comm. of Conference).
CONGRESSIONAL RECORD, Vol. 129 (1983):

Feb. 3, considered and passed Senate.

Feb. 15, H.R. 1043 considered and passed House.

Mar. 8, considered and passed House, amended, in lieu of H.R. 1043.

June 27, Senate agreed to conference report; disagreed to House amendment.

Aug. 1, House agreed to conference report; receded from its amendment.

